

**Lim Hai Hing & Anor (as the representative of the estate of
Lim Sitt Min @ Lim Chin Seng, deceased) v Lim Tuck Thien**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
A-02-(IM)-1417 OF 2011
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
7 JULY 2013

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*Civil Procedure — Appeal — Interference by appellate court — Whether there was
judicial appreciation of totality of evidence — Whether appellate interference
warranted*

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*Contract — Consideration — Failure to pay — Whether proven — Limitation —
Whether respondent's claim time barred — Whether decision of Court of Appeal in
earlier suit postponed start of cause of action*

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In 1998 the respondent had taken legal action against his father's estate ('the
1998 suit') for a declaration that he was still a shareholder of Lim Tai Ming &
Sons Credit Sdn Bhd ('the company'). The respondent's case in the 1998 suit
was premised on the contention that his signature on the transfer form
transferring 355,000 shares in the company to his late father was invalid
because his signature on the transfer form was a forgery. The respondent's claim
in the 1998 suit was sustained in the High Court, but on appeal the Court of
Appeal reversed the High Court decision and upheld the validity of the transfer
of the 355,000 shares. In view of the decision of the Court of Appeal, the
respondent filed the present suit to recover the sum of RM355,000 or the
consideration that he had not received from the transfer of the 350,000 shares
in the company. The appellants raised the plea of limitation and contended
that the respondent's claim was barred by the Limitation Act 1953 ('Act'). The
judicial commissioner ('the JC') found that the plea of limitation could not be
sustained in view of the Court of Appeal's decision in the 1998 suit. The JC
thus allowed the respondent's claim of RM355,000. This was the appeal arising
from that decision.

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Held, allowing the appeal with no order as to costs:

- (1) It is trite law that periods of limitation start to run only when the cause of
action arises. The transfer of the 355,000 shares by the respondent to his
late father took place on 24 August 1993, and time started to run as from
that date. Accordingly, the respondent's claim was time barred by the Act.
The respondent's submission that the Court of Appeal's decision in the
1998 suit had postponed the start of the cause of action had no merit.

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- A The sum total of the findings of the Court of Appeal in the 1998 suit was that the transfer form was valid and this meant that the contents therein were all true. The relevant contents in the transfer form for this appeal was the endorsement that the consideration for the transfer of the 355,000 shares had been paid. That being the case, the respondent ought to have challenged that transfer form in the 1998 suit. As the findings of the Court of Appeal in the 1998 suit relate to the same subject matter of dispute as in this case, the court was fully entitled to take them into consideration when evaluating the respondent's claim (see paras 11, 13–15).
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- C (2) The allegation of non-payment of consideration for the transfer of the 355,000 shares by the respondent was central to the allegation that his signature was forged and ought to have been canvassed and litigated by the respondent in the 1998 suit. The principle of *res judicata* and issue estoppel would therefore apply to strike out the respondent's present claim (see paras 17–18).
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- E (3) The JC had allowed the respondent's claim because he found the evidence of the respondent's witnesses to be more credible than the appellant's, and an appellate court should be slow in interfering with the findings of the trial court. However, when the appellate court finds that the trial court had not carried out its function of judicially appreciating the totality of the evidence it is duty bound to interfere. In the present case the JC had not looked at the surrounding circumstances of the case before him. In his grounds of judgment the JC had not given any reasons as to why he did not treat the existence of the transfer form as irrelevant in his appreciation of the totality of the evidence. In view of these omissions, this was a case where intervention was warranted. Hence, it was found that the respondent had failed to prove on a balance of probability that the consideration of the 355,000 shares had not been paid (see para 21).
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[Bahasa Malaysia summary]

- H Pada tahun 1998 responden telah mengambil tindakan undang-undang terhadap estet bapanya ('tindakan 1998') untuk perisytiharan bahawa dia masih pemegang saham Lim Tai Ming & Sons Credit Sdn Bhd ('syarikat'). Kes responden dalam tindakan 1998 adalah berdasarkan atas hujahan bahawa tandatangannya atas borang pindahan memindahkan saham sebanyak 355,000 dalam syarikat tersebut kepada mendiang bapanya adalah tak sah kerana tandatangannya atas borang pindahan adalah palsu. Tuntutan responden dalam tindakan 1998 dikekalkan di Mahkamah Tinggi, tetapi atas rayuan Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi dan mengesahkan kesahan pindahan saham sebanyak 355,000 tersebut. Mengambil kira keputusan Mahkamah Rayuan, responden memfailkan tindakan ini untuk mendapatkan balik jumlah RM355,000 atau balasan yang
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dia tidak terima daripada pindahan 350,000 saham di dalam syarikat tersebut. Perayu-perayu membangkitkan pli had masa dan berhujah bahawa tuntutan responden dihalang oleh Akta Had Masa 1953 ('Akta'). Pesuruhjaya kehakiman ('PK') mendapati bahawa pli had masa tidak dapat dikekalkan mengambil kira keputusan Mahkamah Tinggi dalam tindakan 1998 tersebut. PK oleh itu membenarkan tuntutan responden sebanyak RM355,000. Ini adalah rayuan berbangkit daripada keputusan tersebut.

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Diputuskan, membenarkan rayuan tanpa perintah kepada kos:

- (1) Adalah undang-undang nyata bahawa tempoh had masa mula berjalan hanya apabila kausa tindakan berbangkit. Pindahan saham sebanyak 355,000 tersebut oleh responden kepada mendiang bapanya dibuat pada 24 Ogos 1993, dan masa mula berjalan dari tarikh tersebut. Oleh itu, tuntutan responden adalah dihalang masa oleh Akta tersebut. Hujahan responden bahawa keputusan Mahkamah Rayuan dalam tindakan 1998 telah menengguhkan permulaan kausa tindakan tidak mempunyai merit. Jumlah keseluruhan dapatan Mahkamah Rayuan dalam tindakan 1998 adalah bahawa borang pindahan tersebut adalah sah dan ini bermaksud bahawa kandungan di dalamnya kesemuanya adalah benar. Kandungan relevan dalam borang pindahan untuk rayuan ini adalah sokongan bahawa balasan untuk pindahan saham sebanyak telah dibayar. Dengan itu, responden patut mencabar borang pindahan dalam tindakan 1998 tersebut. Memandangkan dapatan Mahkamah Rayuan dalam tindakan 1998 tersebut berkaitan dengan perkara sama pertikaian seperti dalam kes ini, mahkamah berhak sepenuhnya untuk mempertimbangkannya apabila menilai tuntutan responden (lihat perenggan 11, 13–15).
- (2) Dakwaan balasan tidak dibayar untuk pindahan saham sebanyak 355,000 tersebut oleh responden adalah penting kepada tuduhan bahawa tandatangannya dipalsukan dan patut dikempen dan dilitigasi oleh responden dalam tindakan 1998 tersebut. Prinsip *res judicata* dan isu estoppel oleh itu diguna pakai untuk membatalkan tuntutan responden (lihat perenggan 17–18).
- (3) PK telah membenarkan tuntutan responden kerana beliau mendapati keterangan saksi-saksi responden lebih boleh dipercayai daripada saksi-saksi perayu, dan mahkamah rayuan patut perlahan dalam campur tangan terhadap dapatan mahkamah perbicaraan. Walau bagaimanapun, apabila mahkamah rayuan mendapati bahawa mahkamah perbicaraan tidak menjalankan fungsinya dengan secara kehakiman menilai keseluruhan keterangan, adalah menjadi tugasnya untuk campur tangan. Dalam kes ini PK tidak melihat kepada keadaan sekeliling kes di hadapannya. Dalam alasan penghakimannya PK tidak memberi apa-apa alasan mengapa beliau tidak menghakimi kewujudan borang pindahan

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- A sebagai tidak relevan dalam penilaiannya terhadap keseluruhan keterangan. Mengambil kira ketinggalan ini, kes ini adalah di mana campur tangan adalah diwajibkan. Maka, didapati bahawa responden telah gagal atas imbalan kebarangkalian bahawa balasan kepada saham sebanyak 355,000 tersebut tidak dibayar (lihat perenggan 21).]

B **Notes**

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

C **Cases referred to**

Armagas Ltd v Mundogas SA, The Ocean Frost [1985] 1 Lloyd's Rep 1, QBD (refd)

Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor [1989] 1 MLJ 35, SC (refd)

- D *Guan Teik Sdn Bhd v Hj Mohd Noor bin Hj Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (refd)

Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien [2001] 1 MLJ 57; [2000] 4 AMR 4654, CA (refd)

- E *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; [1986] CLJ (Rep) 256, SC (folld)

Legislation referred to

Evidence Act 1950 s 91

- F Limitation Act 1953

Appeal from: Civil Suit No MI 22–82 of 2001 (High Court, Pulau Pinang)

V Vijaya Segaran (Danial Rahman with him) (LW Ong & Chan) for the appellant.

- G *Gurbachan Singh s/o Bagawan (Bachan & Kartar) for the respondent.*

David Wong JCA:

INTRODUCTION

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[1] This is an appeal against the decision of the High Court in which the learned judicial commissioner allowed the plaintiff/respondent's claim of RM355,000 being the consideration which his father, Lim Sitt Min @ Lim Chen Seng ('the deceased') allegedly did not pay for the transfer of 355,000 shares in Lim Tat Ming & Sons Credit Sdn Bhd.

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[2] The claim against the father was filed after his death which occurred on 28 February 1994 and the present appellants represent the estate of Lim Sitt

Min.

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BACKGROUND FACTS

[3] The respondent had in 1998 taken legal action against Lim Tai Ming & Sons Credit Sdn Bhd for a declaration that he was still a shareholder in it. This relief related to 355,000 shares which is also the subject matter of this appeal.

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[4] The respondent's case in the 1998 suit was premised on the contention that his signature on the transfer form of the 355,000 shares to his father was a forgery.

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[5] The respondent's claim was sustained in the High Court. On appeal to the Court of Appeal, the High Court's decision was reversed and it was the finding of the Court of Appeal that the signature of the respondent was not forged. The judgment of the Court of Appeal can be found in [2001] 1 MLJ 57; [2000] 4 AMR 4654 under the name of *Lim Tai Ming & Sons Credit Sdn Bhd v Lim Tuck Thien* [2001] 1 MLJ 57; [2000] 4 AMR 4654.

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[6] In view of the Court of Appeal's decision in upholding the validity of the transfer of the 355,000 shares, the respondent started this suit to recover the sum of RM355,000 being the consideration for the transfer to his late father.

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[7] For completeness it should be mentioned that the father's estate was initially represented by one Lim Tuck Cheong who was found to be a bias towards the respondent by the Court of Appeal. Since then the present appellants had intervened in this suit and was joined as the defendants who are now the appellants herein.

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HIGH COURT DECISION

[8] The learned judicial commissioner based his decision on in our view two grounds:

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- (a) the plea of limitation by the appellants cannot be sustained in view of the Court of Appeal's decision in finding that there was no forgery of the respondent's signature as alleged in the 1998 suit; and
- (b) he found the evidence of the respondent's witnesses to be more credible to that of the appellants' witnesses.

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A GROUND OF APPEAL AND OUR GROUNDS OF DECISION

[9] Learned counsel for the appellants in his submission raised four grounds and in our view they can be encapsulated into three issues as followings:

- B** (a) whether the respondent's claim is barred by the Limitation Act?
- (b) whether the respondent is barred by the principle of res judicata in that the cause of action in this case could and should have been raised in suit 1998? and
- C** (c) whether the learned judge erred in not concluding that the deceased father had failed to pay the sum of RM355,000?.

D *Issue (a) — Limitation*

E [10] The contention of the respondent is simply that his cause of action only accrues when the Court of Appeal ruled that his signature on the Transfer Form 32A was not a forgery on 22 August 2000 and when his suit was filed in 2001, he was well within six years period prescribed by law. This contention as pointed out earlier was sustained by the learned judicial commissioner.

F [11] It is trite law that periods of limitation start to run only when the cause of action arises. It is undisputed that the transfer of the 355,000 shares took place on or about 24 August 1993. The question then before us is whether the Court of Appeal's decision in 1998 suit had postponed the start of the cause of action.

G [12] In determining this question, one must look what was held by the Court of Appeal for the 1988 suit. To recap, the same transfer form was the subject matter in dispute and it was held by the Court of Appeal that the allegation of the respondent's forgery was not proved. This is what the Haidar b Mohd Noor JCA (as he then was) said:

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I On the issue that D4 (transfer form for the 355,000 shares) was not dated when it was signed and no record of its execution date kept by the defendant company, counsel for the defendant company submitted that this does not mean that the transfer form (D4) is invalid (*Robert Tan & Ors v Tommy Tan & Anor* [1984] 1 MLJ 230 at p 233). The issue of the execution date is a matter entirely between the transferor and the transferee and in so far as the defendant company is concerned, the record will only show when the transfer document was presented and DW1 and DW2 had given evidence on this issue (see p 243 para C and p 286 para C of the appeal record, vol 1).

There is also the evidence of the plaintiff's reaction when he learnt of the transfer of his shares upon his return from Japan. The fact that he was surprised upon learning of it does not tally with his evidence that he was in communication with his brothers and inquired about the defendant company and yet PW2 did not inform him about the transfer when PW2 was a signatory to the resolution (P2) and therefore knew of the transfer of the said shares. The learned judge should have considered whether the plaintiff's claim that he was not informed of the transfer of the said shares is plausible or not. The transfer of the said shares is very crucial and could not possibly escape PW2's mind in his communication with the plaintiff (Respondent in this appeal) relating to the affairs of the defendant company.

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As the learned judge found that the plaintiff's father ran the defendant company, a family company, in an autocratic manner, this lends support that the plaintiff dared not question his father when asked that the plaintiff's shares be transferred to him. PW2 himself said that he obediently signed P2 when it was handed to him for his signature. There was the further evidence that the other brother of the plaintiff i.e. Lim Teik Huat (PW7) gave up his shares willingly to his father and resigned as a director (see p 186 and pp 231–232 of appeal record, Vol 1). There was therefore credence to the evidence of DW1 that he brought D4 to the plaintiff who signed it in the presence of his father. DW1 was in no position to say whether there was a discussion or not on the transfer as when he handed D4 the plaintiff was already with his father. The question of whether there should have been discussion of the transfer of the said shares is merely speculative on the part of the learned judge given his own finding that the defendant company was run in an autocratic manner and it is unlikely that the plaintiff dared to challenge his father's directive.

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The other telling evidence which should have triggered the learned judge's mind would be why it took the plaintiff a few months after the death of his father to lodge a police report alleging forgery. It would show more probable than not that having failed to obtain the monies to settle his debts which he acknowledged, he decided to put pressure on his half brothers by lodging the police report alleging forgery. The plaintiff knew fully that with the death of his father, the only evidence left in respect of the alleged forgery would be the evidence of DW1 and the denial of his signature on D4. Had his father been alive, he would not dare bring this action for fear of his father and further the evidence of his late father would certainly be against him. The learned judge, with respect, failed to adequately consider this piece of evidence.

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[13] The sum total of above findings is simply that the transfer form is a valid document and what that means is that the contents therein are all true. It also means that the respondent in that case was found wanting in the realm of truth and the implication is that he knew all along what he had signed and the contents contained in the transfer form. The relevant contents in the transfer form for this appeal is the endorsement that the consideration for the transfer of the 355,000 shares had been paid. That being the case, if he wanted to challenge that transfer form, he should have challenged there and then. In another words, time started to run from 24 August 1993.

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[14] We are aware of the fact that those findings are from another the 1998

A suit but when those findings relate to the same subject matter of dispute as in this case, we are fully entitled to take them into consideration when evaluating the respondent's claim in this case.

B [15] With respect to the learned judicial commissioner, he had not considered these findings in the 1998 suit and had he done so, he would have come to a different conclusion. Accordingly we find that the respondent's claim in this case is time barred by the Limitation Act.

C *Issue (b) — res judicata and/or issue estoppel*

[16] The principle of res judicata and issue estoppel is succinctly set out in *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 where Abdoolcader SCJ said this:

D There is moreover the inherent jurisdiction of the court in cases where res judicata is not strictly established, and where estoppel per rem judicatam has not been sufficiently pleaded, or made out, but nevertheless the circumstances are such as to render any re-agitation of the questions formally adjudicated upon a scandal and an abuse, the court will not hesitate to dismiss the action, or stay proceedings therein, or strike out the defence thereto, as the case may require. It would suffice in this regard to refer to the judgment of the Privy Council delivered by Lord Wilberforce in *Brisbane City Council and Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1979] AC 411 at p 425.

E The second defence is one of 'res judicata'. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut out from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wilgram V-C in *Henderson v Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v Commissioner of Taxation* [1926] AC 155.

G A recent application of it is to be found in the decision of the Board in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

H ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings, (p 590).

I The attempt by way of the instant proceedings to re-litigate and reopen the earlier action clearly reflects the appositeness of the caption suggested for this matter in the prelude to this judgment and would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v Chief Constable of the West Midlands Police & Ors* [1982] AC 529, 542.

[17] The allegation of non-payment of consideration for the transfer of the 355,000 shares by the respondent in our view is central to the allegation that his signature was forged. We say for the simple reason that if he had not signed he would not have received any consideration. Hence we are at a loss as why that contention was not canvassed by the respondent in the 1998 suit.

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[18] Applying the principle of issue estoppel to the circumstances at hand, we have no hesitation to conclude that the aforesaid principle applies in this case with full force.

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Issue (c) — payment of RM355,000

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[19] The starting point of our deliberation on this issue must be the transfer form. As pointed out earlier, the transfer form specifically states that the consideration for the transfer had been paid. Hence, there is documentary proof that the consideration had been paid. Not only that, that documentary proof was acknowledged by the respondent himself by virtue of his very own signature.

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[20] The law is clear and that is where there is a written agreement, no oral evidence can be admitted to contradict the written words (s 91 of the Evidence Act). However evidence of fraud or forgery can be led to challenge the contents of the document. In this case this is what the respondent did in the 1998 suit and unfortunately for him he had failed.

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[21] We are fully aware that the learned judicial commissioner had found that the evidence of the respondent's witnesses to be more credible than that of the appellant's. We are also fully aware that as an appellate court, we should be slow in interfering with the findings of the trial court. However when the appellate court finds that the trial court had not carried out its function of judicially appreciating the totality of the evidence, we are duty bound to interfere.

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[22] What amounts to judicial appreciation of evidence can be gleaned from the (then) Supreme Court in *Eastern & Oriental Hotel (1951) Sdn Bhd v Ellarious George Fernandez & Anor* [1989] 1 MLJ 35 which quoted with approval the decision in *Armagas Ltd v Mundogas SA, The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p 37 that:

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It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

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[23] Similarly the Court of Appeal in *Guan Teik Sdn Bhd v Hj Mohd Noor bin*

- A *Hj Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324 at p 440 (MLJ); p 330 (CLJ) gave similar advice in the following manner:

B In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also incumbent upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact.

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- C We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened 18 years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued.

- D [24] In *Armagas Ltd v Mundogas SA, The Ocean Frost* [1985] 1 Lloyd's Rep 1 one of Lordship said at p 57:

E Speaking from experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to

F a judge in ascertaining the truth.

- G [25] With respect to the learned judicial commissioner, not only did he not look at the surrounding circumstances of the case before him, he in his grounds never referred to the transfer form itself and did not give any reasons as to why he did not treat the existence of the transfer form as irrelevant in his appreciation of the totality of the evidence.

- H [26] In view of the above omissions by the learned judicial commissioner, we find that this is a case where intervention by us is warranted. Hence we find that the respondent had failed to prove on a balance of probability that the

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consideration of the 355,000 shares had not been paid.

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CONCLUSION

[27] For reasons stated above, we allowed the appeal, set aside the decision of the High Court and make no order as to costs. We also order that the deposit is to be refunded to the appellant.

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Appeal allowed with no order as to costs.

Reported by Kohila Nesan

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